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## **The Historical Approach and the ‘War of Ethics within the Ethics of War’**

**Christian Nikolaus Braun**

Contemporary just war thinking has mostly been split into two competing camps, namely Michael Walzer’s approach and its revisionist critics. While Walzerians employ a casuistical method, most revisionists resort to analytical philosophy’s reflective equilibrium. Importantly, besides employing different methods the two sides also disagree on substantive issues. This article focuses on one such issue, the moral equality of combatants, arguing that while a methodological reconciliation between the two camps is impossible contemporary debate would benefit from a ‘third-way’ approach. Presenting James Turner Johnson’s historical method as such an approach the article suggests that while revisionists are correct in considering the symmetry thesis as ethically indefensible, in order to arrive at this judgement, it is not necessary to employ far-fetched thought experiments and the use of historical cases is preferable. The root cause of Walzer’s problematic reasoning vis-à-vis the symmetry thesis, the historical approach reveals, is his uneasy relationship with the just war tradition. Contributing to a deeper understanding of the respective approaches’ differences the article seeks to move the focus of contemporary just war away from a narrow intra-disciplinary divide and toward an engagement with substantive questions.

### **Introduction**

Contemporary just war debate has mostly been split into two competing camps, namely Michael Walzer’s approach and its revisionist critics in which both sides disagree on both substance and method. The Walzerian or ‘traditional’<sup>1</sup> just war pursues an ethics of war which is state-based and collectivist whereas revisionists reject this foundation, arguing instead from a position they refer to as reductive individualism. While the former camp employs a casuistical approach (Walzer 2015: xxii), the latter takes pride in belonging to the school of analytical philosophy. As casuists, Walzerians reason from real-world events while most revisionists prefer to elaborate on other-worldly thought

experiments.<sup>2</sup> One consequence of their very different methods is that the two camps hardly engage with each other's work. A narrow intra-disciplinary divide has emerged and debate has become 'confusingly polarized' (Clark 2017: 331), leading to the impression of a 'war of ethics within the ethics of war' (Vaha 2013: 183). While some scholars have attempted to start an exchange between the two camps these efforts have largely been met with indifferent silence.<sup>3</sup> This article argues that just war debate, due to the two camps' fundamental methodological disagreements, will continue to be split and any attempt of bringing the two together on methodological grounds must fail. This conclusion derives not so much from doubtlessly existing academic egos, but more so from the analytical camps' search for moral truth which requires abstraction and thus has little to no place for the messy circumstances of real-world employments of force. Arriving at this conclusion, however, does not mean that just war thinkers should built an intellectual fire protection wall which prevents the other side's substantive thought from spreading. This article suggests that contemporary just war thinking would benefit from a 'third-way' approach whose method parts with both Walzerians and revisionists. Employing the historical approach of James Turner Johnson the article seeks to illuminate one of the fiercest battles in the 'war of ethics,' namely debate over the moral equality of combatants which Walzerians defend and revisionists reject. Reflecting on the moral symmetry thesis by using Johnson's method it turns out that, while revisionists are correct that there cannot be a moral equality between just and unjust combatants, in order to arrive at this judgement, it is not necessary to rely on artificial thought experiments.

Proceeding in a straightforward manner, this article starts with a basic overview of the 'war of ethics.' Beginning with a presentation of Walzer's casuistical method it will be argued that Walzer, while considering historical cases, does not vigorously engage the just war tradition. Instead of pointing out how his argument fits in with the development of just war, Walzer starts from the legalist paradigm which itself is the result of numerous 'renegotiations' (O'Driscoll 2008a) of just war thinking. This section is followed by a presentation of the method his revisionist critics employ. Providing an impression of the 'war' between Walzer and his critics, Walzer's passionate response to revisionists

will be discussed thereafter. Due to the distinctiveness of their respective approaches the argument will be put forward that a methodological reconciliation between Walzerians and analytical just war thinkers is impossible. Section four provides an illustration of the disagreement between Walzerians and revisionists by introducing the debate about the symmetry thesis. In order to demonstrate that this debate is far from being settled Walzer's recent case for considering Islamist terrorists the legal and, following his reasoning, moral equals, too, of US soldiers will be discussed. The following section compares the contemporary just war thinking of both Walzer and his critics with the historical mode of just war reasoning as represented in Johnson's work. It will be pointed out that Johnson's method, like Walzer's, casuistically investigates real-world events. However, Johnson seeks to enter into a conversation with previous thinkers which Walzer does to a limited extent only and most revisionists object to. It will be argued that while revisionists are correct that Walzer's argument for a moral equality of combatants is ethically indefensible, in order to arrive at this conclusion, it is unnecessary to resort to analytical construction. Hence, the article demonstrates that just war debate can benefit from the analytical rigour of revisionists who have consistently pointed their fingers at what they see as moral flaws in Walzer's theory while, at the same time, it does not have to sacrifice the use of history.

### **Walzer's Just War**

In the preface of *Just and Unjust Wars*, Walzer emphasises that the way he sees the morality of war is unlike the way political or moral philosophers see it. For him, the condition of war is so dire that it seems irreconcilable with the enterprise of philosophical reflection. In consequence, Walzer 'expresses ignorance about the foundations of ethics' (Boyle 1997: 85) as, in his own words, his 'main concern is not with the making of the moral world but with its present character' (2015: xxii). In his opinion, it is the here and now that matters and if he were to contribute to the debate about the foundations of ethics, he would probably get lost in that debate. As a result, he describes his book as one of a 'practical morality' as he does not directly engage 'the most profound questions of moral philosophy.' In addition, he argues that the correct method for 'practical morality' is casuistical. Walzer seeks to

consider historical cases in order to derive judgements and justifications from them, emphasising the value of the experiences men and women make during war (2015: xxii-xxiv). In particular, Walzer objects to the approach of international lawyers who, no matter the circumstances, uphold the 'legalist paradigm,' built around the core principles of states' rights to political sovereignty and territorial integrity. Discounting the work of lawyers as 'utopian quibbling,' Walzer (2015: xxiv-xxv) argues that 'Legal treatises do not, however, provide a fully plausible or coherent account of our moral arguments, and the two most common approaches to the law reflected in the treatises are both in need of extra-legal supplement. ... The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.' According to Walzer (2015: 86) morality demands that the legalist paradigm cannot be sacrosanct and that there must be certain 'rules of disregard.' It is his work as moralist to consider when the legalist paradigm should be abandoned. Arguing for exceptions to the legalist paradigm, Walzer's practical morality does not associate itself with any one school of morality (Glennon 2013: 118). Rather, according to Glennon (2013: 120), Walzer suggests a 'philosophical hopscotch' which integrates various approaches, including one of individual rights which gives rise to the rights of states, as well as utilitarianism.

Having noted Walzer's criticism of the legalist paradigm, however, he himself at times employs a legalist reading of the just war as he takes the legalist paradigm as his default position. As a result, he has an uneasy relationship with the classical just war which precedes the legalist paradigm and is the historical source of the laws of war. In particular, arguably due to his background as democratic socialist political philosopher, Walzer seems to have little interest in engaging with the mainly Christian roots of the just war (Brown 2018: 205). As Walzer (2015: xxvi) puts it himself:

My own work, then, looks back to that religious tradition within which Western politics and morality were first given shape, to the books of writers like Maimonides, Aquinas, Vitoria, and Suarez – and then to the books of writers like Hugo Grotius, who took over the tradition and began to work it into secular form. But I have not attempted a history of just war theory, and

I quote the classical texts only occasionally, for the sake of some particularly illuminating or forceful argument.<sup>4</sup>

Importantly, these Christian beginnings emphasised that positive law, although doubtlessly important, was subject to the higher natural law (Biggar 2013: 15). Although Walzer objects to lawyers' literal treatment of the legalist paradigm and he considers positive international law as 'radically incomplete' (2015: xxvi) critics charge that Walzer builds his account around the bedrocks of the legalist paradigm and the domestic analogy which subsequently 'do the opposite of what his opening preface suggests' (Rengger 2005: 150). While Lazar's (2017a: 38) view that Walzer's 'central commitment is to provide moral foundations for international law as it applies to armed conflict' is perhaps too narrow, nonetheless, in parts of Walzer's reasoning, international law takes on the function of a 'frame' (Johnson 2014: 5) through which he sees the moral world. At times, the frame of international law leads him to argue against some of the most important and arguably commonly accepted moral principles such as the requirement to discriminate between the guilty and the innocent as he does in his controversial argument for the moral equality of combatants. Unsurprisingly, Walzer's just war theory has been critiqued as being under the threat of falling into the traps of conservatism and relativism. The trap of conservatism entails that Walzer removes the critical function of just war in that he starts his assessment of the morality of war from the vantage point of the current state of the legality of war. At the same time, however, Walzer's just war theory may be considered to be relativist in the sense that his moral argument follows the development of the legality of war and thus emphasises changes in international society over moral principles (O'Driscoll 2008a: 96-98). To sum up, while Walzer reasons from 'historical illustrations' he does engage with the historical just war tradition in a limited way only. In contrast, he takes the legalist paradigm as his starting point and either defends or argues for exceptions to it.

### **Walzer's Revisionist Critics**

Walzer's interpretation of the just war has been challenged ever since he first put forward his argument in 1977. While four early critics (Beitz 1979; Doppelt 1978; Luban 1980; Wasserstrom 1978) caused 'cracks' in his theory, during the last twenty years, according to Walzer's most prominent revisionist critic today, Jeff McMahan (2012), the cracks 'have widened into gaping crevices.' The revisionist account has been put forward by philosophers working within the analytical tradition who have meticulously scrutinised Walzer's argument. In particular, they accuse the Walzerian just war of having 'so far failed to articulate a rigorous, detailed, theoretically unified, and plausible account of the resort to war' (McMahan 2014: 242). Most revisionists would describe themselves as working on the ethics of war, rather than, as Walzer does, on just war theory. Their main concern is to write novel philosophy on war-related issues such as the ethics of harming, the duty to save, or political authority. Relying on Rawls's method of reflective equilibrium, they take Walzer's just war idea as the ruling theory that must be checked for logical incoherence with the goal of constructing a better theory. In Lazar's (2017b: 114) words, analytical philosophers

develop moral arguments by taking our considered judgments about the permissibility of actions in particular cases and trying to identify the underlying principles that unify them. We then take those principles and test how they apply to other cases, real or hypothetical. If the principles generate conclusions that conflict with our considered judgments those cases, then we must revise either the principles or our judgments. As our project evolves, and we revise our principles in light of our judgments and our judgments in light of our principles, we approach reflective equilibrium (the underlying standard of epistemic justification is coherentist).

In order to arrive at the state of reflective equilibrium, most revisionists rely on thought experiments quite different from the 'historical illustrations' Walzer employs in his type of casuistry. Frowe (2014: 4) describes the ostensible merits of 'simple' and 'fantastic' cases as follows:

They are simple so that we can more easily isolate the variables that influence our intuitions about whether a person may use force in a given case, and more easily compare and contrast the cases with

each other. They are fantastic so that we can cover a wide range of situations and thus more thoroughly test our intuitions and principles.

This 'theoretical bias against the historical or contingent' (Coates 2016: 9-10) is the direct result of their abstract methodology. As Frowe (2014: 4-5) clarifies, revisionists see the practicality of philosophy

not solely in its ability to churn out answers to particular real-life cases. ... philosophy's practicality can sometimes lie in its ability to clarify our ideas and our thinking before we get to the level of real life, and this is often best achieved by being one or two steps removed from real-life cases. Stripping away the detail can enable us to identify general principles that can be obscured by the intricacies of historical cases.

The primary target of revisionists is the prominent role Walzerians award to the state. Rejecting the domestic analogy, revisionists allocate moral responsibility for killing in war to individuals, not states. They hope to discredit Walzer's just war theory which they describe as 'a very state-based, collectivist approach to war' and argue for a 'reductive individualism' which is reductivist as result of the assumption that the rules which regulate killing in war are the same as those regulating interpersonal killing outside of war (2014: 13). The central argument of reductivism is that there exists only one set of moral principles which applies all the time, rather than distinct principles for different moral domains such as war and peace. Put differently, while Walzer starts by thinking about war, revisionists start by thinking 'about the ethics of killing outside of war, then apply those principles to the case of war' (Lazar 2018: 35). Revisionists are likewise individualists due to the claim that moral theory must concentrate on individuals rather than collectives such as, for example, nation states (Frowe 2014: 13).<sup>5</sup> Revisionists argue against central claims of Walzer's theory including the logical separation between the *jus ad bellum* and *jus in bello*, the moral equality of combatants, and the immunity of non-combatants.

### **Walzer's Response to Revisionists**

In some respect, the differences between Walzer's 'traditional' just war and the revisionists are those between political philosophy and moral philosophy approaches (Lazar 2017a: 41). Walzer (2014: 104)



is proud to acknowledge this as his ‘... subject has always been politics; I have tried to respond to the political issues of my time; I have joined the arguments that my fellow citizens were engaged in. And I mostly haven’t worried if my responses didn’t add up to a coherent theory.’ For Walzer, today’s just war debate falls into two camps. First, his camp which considers just war theory to be about war and, second, the revisionist camp which considers just war theory to be about moral philosophy. Walzer sees little practical significance for what McMahan calls the ‘deep morality of war.’ Due to mainly consequentialist reasons, as McMahan (2006: 40) acknowledges himself, his deep morality might have to retreat behind the laws of war and the former might only take on the function of guiding the individual conscience. Following from this concession, Walzer as advocate of a ‘practical morality’ delegates much of the revisionist just war theory to the academic ivory tower. Walzer feels uneasy about this type of academic discussion so different from the way he himself works.

Many of these theorists take the view that issues of this sort can be delineated most clearly and addressed most conclusively in contexts far removed from war and even in hypothetical and elaborately constructed cases that have no historical or practical reference at all. So they have no need to read, say, military history; the debate is focused elsewhere, and all that is necessary is to read the works of the other participant in the debate. (Walzer 2015: 336-337)

The problem, in Walzer’s view, is that it is the philosophical purpose only that matters to these theorists and that, for example, it is the ‘cleverness of the design’ (2015: 337) that counts rather than addressing moral questions soldiers encounter on the battlefield.

In order to figure out the rules, they may start from the cases, playing with them, changing their details, even inventing possible and impossible variations that test our understanding of the rules as they are, or as they might be, or should be. But these theorists have no commitment to the actual cases until they know the applicable rules, and hypothetical cases will do just as well in figuring things out – perhaps better, since they impose no reality constraints on their designers. (2015: 337) ... And I worry that theorists who focus on these kinds of cases aren’t thinking about war at all. They are not interested, or not sufficiently interested, in what actually happens on the battlefield and what it feels to be there. (2015: 344)

Elsewhere (2006a: 43) Walzer was even more explicit about his rejection of revisionist's analytical construction, referring to McMahan's illustrations as 'a little too fine for my head.' In consequence, Walzer's passionate defence against revisionists mainly seems to rest on the claim that their thinking is of no practical use. As will be pointed out later, such an impractical understanding, Walzer is right to note, violates one of the two key precepts of just war thinking as it has been understood historically. However, and ironically perhaps, despite Walzer's strong objection to revisionist just war thinking, his own reasoning has a major similarity with his critics, namely the violation of the second pole of the historical tradition, its inherently historical nature. As we have seen above, Walzer himself acknowledges that his interest in the origins of just war argument is limited and adopts the legalist paradigm as his moral baseline.

Given the fundamental disagreement between Walzerians and most revisionists about the usefulness of history for moral analysis it seems impossible to achieve a methodological reconciliation. As the analytical just war seeks to discover the moral truth it has no interest in dealing with real-world cases, relying on abstract thought experiments instead. Attempts to make the methodological crevices between the camps less deep, although praiseworthy, will not lead very far. For example, Thaler (2016) who distinguishes between productive and unproductive hypotheticals has made such an attempt. The problem with such bridging accounts, however, is that both sides would have to compromise parts of their core assumptions. In order to arrive at productive hypotheticals revisionists would have to make their cases more like real-world cases while casuists would have to simplify their presentation of cases. The conclusion thus must be that both camps will have to agree to disagree about method.

### **The Moral Equality of Combatants**

As indicated above, one of the main points of disagreement between Walzerians and revisionists is about the issue of moral equality of combatants. In this section, we will briefly consider the very basics of this disagreement.<sup>6</sup> Calling it 'perhaps the strangest rule of war' (2015: 346), Walzer essentially argues that once war has broken out it does not make a moral difference whether or not the cause a

soldier is fighting for is just or not. Following the laws of war, Walzer holds that during war just and unjust combatants are each other's legal *and* moral equals. In his own (2015: 36) words:

It is the sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't *my* enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments. These human instruments are not comrade-in-arms in the old style, members of the fellowship of warriors; they are "poor sods, just like me," trapped in a war they didn't make. I find in them my moral equals.

Once in a state of war, a state of exception during which a different morality applies, soldiers, as instruments of their collective, are mostly liberated from the moral responsibility to judge the justice of his or her collective's war.

Interestingly, with regard to the so-called 'war on terror,' Walzer has extended the moral equality thesis to a war between a collective and individuals. While terrorists necessarily fail the just war criterion of sovereign authority and they thus fight an unjust war, for Walzer, the confrontation with Islamist terrorists can nonetheless rise to the level of war. Consequently, once in a state of war, following the moral equality thesis, individual terrorists would be the legal *and* moral equals of soldiers representing their collective. Admittedly, Walzer does not address the issue of the moral equality of combatants in his published work on policies such as targeted killing but he indicated in a high-profile lecture (2013) that terrorists would have to be given equal rights if the confrontation between the US and Islamist terrorism were considered to be one of war. It thus seems safe to assume that, following his previous argument for inter-state conduct, terrorists enjoy moral equality, too. As pointed out above, in order for the moral equality of combatants to apply, a state of war is the necessary pre-requisite. Walzer has in fact been hesitant to see all of the so-called 'global war on terror' as war.<sup>7</sup> However, with regard to the targeted killing of Osama bin Laden Walzer (2011) has spoken of a war: 'So the killing of Osama bin Laden was an act of war. He was certainly a legitimate target, as the head of an organization that had declared itself to be at war with the United States - and delivered a devastating attack.' Elsewhere (2016: 13) Walzer further explained his thinking:

Individuals who plan, organize, recruit for, or participate in terrorist acts are, all of them, legitimate targets. It would be better to capture them and bring them to trial, but that is often not a reasonable option: the risks are too high; innocent bystanders would be killed in the attempt; the planning would take time and the terrorist attacks are imminent or actual. In such cases, the idea that we are at war with terrorists makes sense.

Considering terrorists the legal and moral equals of US soldiers is a position revisionists and, as we will see shortly, a historical just war approach must reject given bin Laden's status as unjust combatant.<sup>8</sup>

Revisionists, pursuing an individualist morality, are unwilling to let soldiers off the moral hook so quickly. They argue that soldiers fighting for the unjust side cannot be the moral equals of soldiers fighting for the just side based on the determination of just cause. Starting from the principle of individual self-defence, the exclusive instance in which individuals may resort to lethal force, revisionists reason that the only legitimate just cause for war is self-defence. In consequence, if a state goes to war without having been attacked, it lacks just cause and there are thus no legitimate targets for its soldiers. McMahan essentially argues that unjust combatants who kill just combatants commit a crime equivalent to murder in everyday life. With regard to the opposite direction of just combatants engaged in combat with the unjust side, he advocates a rights-based liability account. This particular conceptualisation is rights-based because it claims that a person liable to attack 'would not be *wronged* by being attacked, and would have no justified complaint about being attacked' (2009: 8). In a nutshell, McMahan (2009: 156) argues that liability to defensive force refers to 'the extent to which a person is excused for posing a threat of wrongful harm' and that this 'affects the degree of his moral liability to defensive harm, which in turn affects the stringency of the proportionality restriction of defensive force.' Following from that, he (2009: 159-175) develops a spectrum of wrongful threats who are liable, to a varying extent, to defensive uses of force: culpable threats, partially excused threats, excused and innocent threats, and justified and just threats.

It goes without saying that revisionists like McMahan arrive at the rejection of the moral equality of combatants by employing their particular method. As will be pointed out shortly, the moral equality

of combatants, although defended by Walzer, was alien to classical just war thinkers. The root of this divergence, as we will discover, lies in Walzer's interpretation of the just war. Parting with the just war tradition, he follows the legalist paradigm as his default position and seems to equate legal with moral equality. Revisionists have uncovered this, judged from a pure moral perspective, problematic simplification. Having said that, however, in order to question Walzer's conclusion, it is not necessary to resort to the mostly ahistorical way of reasoning the analytical camp employs. Rather, as the next section demonstrates, a historically aware just war aligns with its revisionist critics on the issue of the moral equality of combatants.<sup>9</sup>

### **The Historical Approach as 'Third-Way'**

It is important to note that despite the differences between the 'traditional' Walzerian and revisionist just war approaches both have something in common that sets them apart from what O'Driscoll (2013: 47) calls the historical approach to just war. As he (2013: 49) points out, Walzer's theory which has no prominent place for the history of just war has been carried on by revisionist just war theorists who seek to avoid engaging the historical development of the tradition, pursuing a more analytical approach regarding its principles. While Walzer justifies his theory through real-world examples and shuns the revisionists for their reliance on artificial thought experiments he, too, is subject to the charge of appreciating the just war tradition to a limited extent only. Put differently, his 'practical morality' is built around an analytical understanding of the role of history which differs markedly from the historical approach which seeks to create continuity between past and present. The historical approach, as found in the work of thinkers like Joseph Boyle, John Kelsay, Cian O'Driscoll, Gregory Reichberg, Nicholas Rengger and, most prominently perhaps, James Turner Johnson,<sup>10</sup> holds that 'the best way to acquire a deep understanding of the ethical categories invoked in relation to war is to study their formation and usage over time. By revealing the historical range and content of these categories, this form of inquiry both attunes us to their particularities and equips us to adapt them to contemporary circumstances' (2013: 50). Here, thinkers do not consider the work of their predecessors to hold limited value only but fully engage with it. In Johnson's (2007: 4) words, 'To reflect morally on

war is to enter the historical stream of moral reflection on war and seek to learn from it, not seek to escape it to some more abstract level.' Walzer, in contrast, seeks to 'divorce *just war past* from *just war present*' (O'Driscoll 2013: 50). Importantly, this does not at all mean that inherited principles may not be challenged: 'The point is that cultivating a sense of the past need not enslave us to it. Rather, the hope must be that it will bestow upon us a deeper, more variegated perspective on the challenges we face today' (Brunstetter and O'Driscoll 2018: 2). For example, St Thomas Aquinas, the key figure in the systematisation of classical just war thinking, came to his conclusions about whether any war could be just through dialectically linking his own position to the particular opinions of his predecessors. As Reichberg (2018: 60) notes, thinkers like Aquinas started with historical thinking about the ethics of war before analysing particular issues for their own sake:

The classical theorists of just war understood that our reasoning about the rights and wrongs of war would only be as good as the premises that form our point of departure. On their view, theoretical reflection would be strengthened through the examination of positions articulated by earlier thinkers. Thereby set in motion was a comparative hermeneutic in which earlier positions were reviewed, not so much out of historical interest, but rather for the didactic purpose of grounding sound reasoning about issues of contemporary import.

For classical just war thinkers, as well as for today's advocates of the historical approach to just war, this approach had several benefits:

it widened the range of available premises and thereby directed the theorist's attention to issues that might otherwise go unnoticed, it facilitated self-reflection by bringing into greater relief the theorist's own cherished assumptions, it showed how a single premise could be drawn towards very different and even opposing conclusions, and it explained the appeal of errors that were operative in contemporary practice, thereby enabling their persuasive refutation. (2018: 60)

It is quite indicative, then, that, as Reichberg (2018: 64) notes, classical just war thinkers did not consider themselves theorists. Even Grotius, the first thinker to actually do so, differed markedly from the attitude of today's analytical thinkers:

Yet, unlike Descartes, who several years later would seek to construct a new science of 'first philosophy' from scratch, Grotius was at pains to demonstrate that his juridical science of war and peace was not a construct born of his own mind, but rather a discipline that emanated from a set of pregiven norms (*jus naturae* – natural right) that had already been acknowledged by a broad array of Greek, Roman, and Christian thinkers.

The problem with Walzer's just war is not that he employs a 'philosophical hopscotch' (Glennon 2013: 120). In fact, St Thomas who, in his influential summary of the just war consensus of his day, articulated a tradition 'which had been shaped by philosophical, theological, and political thinking on natural law, by military thought and practice, by legal traditions reaching back into Roman law, and by accumulated experience in the government of political communities' (Johnson 2013a: 25). Rather, the problem resides with his limited interest in the just war tradition. Johnson's historical just war approach which, not unlike Walzer's, relies on a casuistical analysis of historical circumstances demonstrates that there is value in considering the work of previous thinkers. Johnson (1979: 98-99) describes the moralist's task as one of 'keeping faith,' 'that the moral life of the individual in one of these religious traditions must be one in which ethical guidance comes from the effort to keep one's reflections and decisions faithful to those of others who have gone before and whose examples are remembered by the believing community as normative ways of doing the will of God.' It should be noted that while Johnson is speaking for the Christian moralist here, for him, the task remains the same for moralists operating within secular moral communities. In fact, in the same article (1979: 109-114), Johnson explains how the just war tradition constitutes such a moral community. In his historical work, Johnson takes the medieval consensus on just war as his starting point and investigates how the unfolding of history required changes to the inherited tradition. Regarding his own just war argument, Johnson goes back to Aquinas's summary and investigates what can be learned today from the wisdom of the medieval consensus. In his own words (2009: 246), his work 'has been focused on the tradition that has developed and carried this idea historically and the implications to be drawn from this tradition of just war for present-day reflection and, maybe, practical decision-making. ... my historical investigations are about moral traditions and their implications in particular historical situations, and my efforts at

applied ethics proceed by extrapolating from how just war tradition was applied in such historical situations to how its meaning should be understood in present contexts' (2009: 247). As Kelsay (2009: 180) notes, for Johnson, thinking about ethics is 'fundamentally historical' while his 'type of practical reasoning,' at the same time, does not deny a place to moral principles and rules. While such reasoning at times may seem like an attempt at 'commanding the headwaters of tradition' (O'Driscoll 2008b), Johnson fears that neglecting the history of just war argument leads to a moral loss.

### **The Historical Approach and the Symmetry Thesis**

Employing Johnson's method vis-à-vis the debate about a moral equality of combatants can, if not resolve the 'war of ethics', contribute to a deeper understanding about the methodological assumptions presented above. Importantly, while a classical reading of the just war essentially vindicates the revisionist position it also demonstrates that, in order to illustrate the morally problematic nature of Walzer's conclusion, it is not necessary to resort to analytical construction. Before demonstrating how Walzer's employment of the legalist paradigm vis-à-vis the moral equality thesis is problematic a few words must be said about the inherent connection between just war argument and positive international law. Both are 'historically conditioned realities' which, on their own, 'provide particular perspectives for reflection, policy, and action relating to world order, but at the same time they interact with each other' (Johnson 2017: 453). As far as the legal equality of combatants is concerned, there were important historical reasons for thinkers like de Vitoria and Grotius to argue for what Johnson (1975: 20) has called a state of 'simultaneous ostensible justice' in which, due to the difficulty of determining whose side's cause was just, both sides' belligerents should fight in strict observation of *jus in bello* restraints. Put differently, these thinkers 'renegotiated' the just war tradition in the direction of granting equal rights to combatants on both the just and unjust side. As Johnson (2017: 458) notes, 'Grotius's thinking on the consensual limits to conduct in war was, for practical purposes, the beginning of the idea of a law of armed conflicts as rooted in European cultural standards.' However, what these thinkers did not do is break with the conviction that objectively at least one side had to be in the wrong. Put differently, they paved the way towards legal equality while



continuing to deny the notion of moral equality. Consequently, Walzer loses something by taking the legalist paradigm as his starting point. Upholding that paradigm, as we saw above, without revisions in his argument for a moral equality of combatants, he seems to equate legality and morality. As Reichberg (2018: 71-74) demonstrates, Walzer's claim that the moral equality thesis is part of the classical just war is thus mistaken. There was, in fact, a group of medieval thinkers, the so-called camp of 'regular war,' which argued for a logical separation between *jus ad bellum* and *jus in bello*. However, these thinkers cannot be considered as advocates of the just war.

What, then, are we to make of Walzer's seemingly equation of legality and morality vis-à-vis the moral symmetry thesis? Given that Walzer set out to argue for a 'practical morality' it seems that the relationship between legality and morality in his work is a result of his pragmatic account of just war. Rather than being a result of his de-emphasis of previous thinking Walzer might be read as making this choice for a deliberate philosophical reason. In particular, it seems that Walzer, in his defence of the moral symmetry thesis, is stressing a key element of the just war tradition, namely the reminder that even one's enemy never ceases to be a human being. This concern for the 'poor sods' like, for example, German soldiers who were forced to serve in the Wehrmacht although they despised Hitler's ideology, seems to undergird Walzer's reasoning. Those soldiers were 'trapped in a war they didn't make' and the result of acting in accordance with their conscience would have been the death penalty. It is this sensibility to the moral conundrums of war which lead Walzer towards his embrace of the moral equality of combatants. Importantly, the classical just war was not at all dismissive of the reasoning which lets Walzer arrive at the moral symmetry thesis. For classical thinkers, granting equal rights to both the just and unjust side, on first look, amounted to a violation of natural right (*ius naturale*). However, Aquinas already who worked centuries before de Vitoria and Grotius acknowledged that 'the dictates of human positive law (*lex humana*) do not entirely overlap with those of natural law (*lex naturale*)' (Reichberg 2017: 240). As a result, St Thomas could imagine cases in which unjust combatants, while still contributing to an act of injustice, were morally blameless and should thus not

be prosecuted. In other words, while there could never be a moral equality as advocated by Walzer, there might be, depending on the circumstances, reason to grant equal rights.<sup>11</sup>

That said, the fact that Christian tradition maintains a basically moral, punitive justification of war and of killing does not preclude it logically from endorsing laws of war that accord equal *legal rights* to all combatants. The justification for this is at once practical and moral: namely to stop the conduct of war from spinning out of all moral control, and so to limit its evils. This does not imply the logical impossibility that the same belligerency can be both just and unjust at the same time. (Biggar 2013: 196)

Furthermore, the manoeuvring between natural law and human positive law which gave rise to the legal equality of combatants is a testament to the historical connection between just war thinking and statecraft. In contrast to revisionists who concentrate on individual rights a classical thinker like Aquinas was 'far more interested in political duties and obligations of the individual in society than in the political rights and privileges to which the individual lays claim' (Crofts 1973: 166). The foremost goal of statecraft was the common good which meant that the sovereign, who took responsibility for accomplishing that goal, had a very special role. 'Within this frame specialists in moral thinking, along with specialists working from other perspectives, may (and should) offer advice, but final judgment rests with the sovereign, because the responsibility for the good of the community rests on him (or her or, in rare cases, them)' (Johnson 2013b: 24). Unsurprisingly, given the objection of many revisionists (see, e.g., Fabre 2008; Steinhoff 2007) to the sovereign authority criterion, they lose the connection between just war and statecraft emphasised by classical just war thinkers. Walzer, in this regard, is closer to the classical understanding. He continues to argue for the criterion of 'legitimate authority' although, of course, his conceptualisation of the criterion differs from the classical understanding.

In addition, the historical approach turns out to be helpful with regard to moral equality and the so-called 'war on terror.' The classical conceptualisation of war, *bellum*, held that only sovereign authorities could wage war. Private individuals like today's terrorists could not wage *bellum*. Put differently, while a political community's use of force against private individuals could be an act of

*bellum*, private employments of force could only amount to *rixa*, not *bellum*. *Rixa* constituted ‘a use of force to effect private vengeance or to secure other unjustifiable ends, in the absence of authorization from legitimate authority, or in a manner disproportionate to the initial offense’ (Reichberg 2017: 270-271). Walzer, in contrast, holds that while terrorists necessarily fail the authority criterion of just war and their ‘war’ must thus be an unjust one, ‘war’ it can be nonetheless. If we employ Johnson’s method and return to the medieval consensus about the legitimate use of force we quickly realise that there is reason to pause and think whether we should grant individuals the right to wage war. Many revisionists, due to their cosmopolitan convictions argue that we should but a consideration of the circumstances of the Middle Ages and the post-9/11 world cautions against such a move. Historically, one of the reasons behind the limitation of the right to war to sovereign temporal rulers only was a conscious attempt to rein in a worrisome proliferation of actors who claimed to have the right to use armed force and which had resulted in ‘widespread banditry and warlordism’ (Johnson 2007: 7). Given the contemporary spread of non-state terrorist actors, arguing that each and every individual can have the right to wage war, from a historical just war perspective, seems like the re-opening of Pandora’s Box.<sup>12</sup> As a result, the historical approach to just war as represented in ‘Johnson’s work acts as a reminder that we cannot properly address the relation between war and justice without appreciating how these issues have assumed their present form’ (O’Driscoll 2008b: 205). There is value in considering both historical circumstances and in engaging with the wisdom of past thinkers.

To sum up, for the classical just war there may be reasons to grant equal rights to combatants on both the just and unjust side, but they would not face each other as moral equals. Thus, the historical mode of just war sides with revisionists regarding the moral equality of combatants. On top of that, putting this agreement on a broader basis, the historical mode of just war can be read as giving support to the revisionist idea of a distinction between a ‘deep morality of war’ and the laws of war. For example, McMahan (2006: 40) implies that the laws of war may have to be ‘action-guiding’ while the ‘deep morality’ may have to be limited to functioning as ‘a guide to individual conscience.’ There are thus curious parallels between the revisionists’ manoeuvring between the ‘deep morality of war’ and the

laws of war on the one hand and classical thinkers' distinction between *lex naturale* and *lex humana* on the other although both sides are very much at odds with each other in terms of methodology.

## **Conclusion**

This article has presented the historical approach to just war as a 'third-way' in-between Walzerian and revisionist just war theorists. While Walzer objects to revisionists' far-fetched thought experiments and the ensuing impracticality of their moral philosophy he, too, shows an analytical understanding of history as he does engage with the just war tradition in a limited way only. As Walzer's focus is not on the historical development of just war and he takes the legalist paradigm as his starting point for moral analysis he, at times, seems to equate legality and morality. This way of reasoning, the article has argued, can lead to morally problematic conclusions as best illustrated by the example of the moral symmetry thesis. Revisionists, with the help of their rigorous method, have demonstrated that the argument that just and unjust combatants face each other as moral equals is ethically indefensible. Unfortunately, instead of arguing about the moral purchase of their respective arguments, contemporary just war seems to have split into two competing camps which mostly ignore each other's work. This article, by presenting the historical approach as a 'third-way' has made an attempt to re-focus debate on substantive issues. Appreciating the historical development of just war argument the article explained why past thinkers argued for a legal equality of combatants while continuing to deny a moral equality. Walzer, through his embrace of the legalist paradigm, fails to see the complete picture and thus seems to consider legal and moral equality as one and the same. The historical mode of just war reasoning reveals the morally problematic nature of Walzer's argument and thus vindicates the revisionist critique. At the same time, however, like Walzer, the historical approach has little interest in analytical construction and cherishes the lessons military history can teach us. As the historical approach sides with neither party of the contemporary 'war of ethics' all the time it thus may be employed as a tool to avoid an overly concentration on a narrow intra-disciplinary divide.

## Notes

<sup>1</sup> In order to avoid a confusing use of terms regarding different just war schools a few words of clarification are needed. Frowe (2014: 2), one of the most prominent revisionists, refers to Walzer's theory as the 'traditional' just war. As will be pointed out later, while Walzer's theory functions as point of reference for revisionists, his theory markedly contrasts with other modes of just war thinking such as the historical approach.

<sup>2</sup> Admittedly, not all revisionists concentrate exclusively on other-worldly thought experiments. However, noteworthy exceptions such as Fabre's work (2012) do not contradict the assertion that most revisionist work does not want to 'be obscured by the intricacies of historical cases' (Frowe 2014: 5). This article concentrates on the more 'hard-core' exemplars of the revisionist just war. For an in-depth analysis of the differences between revisionist thinkers see Lazar's (2017a) survey article.

<sup>3</sup> For example, Brunstetter (2016: 135-136) suggests a way of how the Walzerian and revisionist just war camps could engage with each other vis-à-vis the concept of *jus ad vim*.

<sup>4</sup> Interestingly, at the end of this sentence, Walzer adds an endnote in which he refers his readers to the work of James Turner Johnson who provides 'a useful study of these writers' (2015: 347).

<sup>5</sup> It must be noted at this point that not all revisionists are reductivists. Noteworthy exceptions are, for example, Lazar (2010) and Renzo (2013) who are both revisionists and exceptionalists.

<sup>6</sup> For a closer look at the revisionist critique of the moral equality of combatants see McMahan's (2009) *Killing in War*. For a summary of the wider debate see the article by Barry and Christie (2018) as well as chapter six in Frowe's (2016) *The Ethics of War and Peace*.

<sup>7</sup> In his work (2006b; 2007; 2016) that deals with the confrontation with terrorism Walzer puts forward a nuanced view in which he manoeuvres between theorists who argue for either the exclusive application of the law enforcement paradigm or the war convention.

<sup>8</sup> It is beyond the scope of this paper to engage in a discussion about the justice of the so-called 'global war on terror.' It is taken for granted that Islamist terrorists of the provenience of al Qaeda or IS are unjust combatants.

<sup>9</sup> Importantly, agreeing on this particular issue does not mean that the historical approach to just war also sides with revisionists on other questions. One issue that immediately comes to mind is the question of exceptionalism. While classical just war thinkers like Aquinas did not accept a moral equality of combatants they, like Walzerians, argued that war and peace had their own distinct moralities, an assertion most revisionists will vehemently oppose. For a discussion of these questions from a historical perspective see Reichberg (2017: 223-256).

<sup>10</sup> Johnson's method has lately received considerable critical appreciation. See, for example, Bellamy (2009), Kelsay (2009), Lang (2009), O'Driscoll (2008b, 2009), Sharma (2009), and Zehr (2009).

<sup>11</sup> Arguably, were Walzer to develop his argument in conversation with these past thinkers the point could be made that his moral symmetry thesis is in full communion with the historical approach as this way of reasoning, as noted above, may well lead to disagreement with one's predecessors.

<sup>12</sup> Interestingly, groups like al Qeda or ISIS, in some respect echoing the revisionist argument, claim that individuals can have the authority to wage what they see as defensive war. As Zehr (2013) points out, those groups appeal to a specific aspect of Muslim juridical tradition, the *fard'ayn*, which holds that in cases the Muslim community is under attack authority to wage war devolves to the individual. While the regular pathway to war as community obligation, the *fard kifaya*, not unlike the Christian just war tradition, requires authorisation by 'sovereign authority' those groups argue that the governments of most Muslim countries fail to meet their obligation toward the common good of the people entrusted to them as they have acquiesced to the attack coming from the West. This acquiescence, then, justifies the individual to wage war in defence of the political community without prior authorisation by the 'sovereign authority.'

Importantly, as far as the classical Christian just war is concerned, St Thomas's political philosophy, too, does not deny that there may be circumstances when the use of force against a sovereign authority by actors who lack the authority to wage war can be justified. For example, Aquinas reasoned about the justified use of force against tyrannical rule. Crucially, however, such uses of force, for the Angelic Doctor, would not constitute war, *bellum*, but civil insurrection, *seditio*.

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